
(2010) 12 AP CK 0112

In the Andhra Pradesh High Court

Case No : Civil Revision Petition No. 3824 of 2010

Patnam Subbalakshamma

APPELLANT

Vs

Sunkugari Sreenivasa Reddy and Balsani Ramesh Babu

RESPONDENT

Date of Decision : 02-12-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 54, Order 21 Rule 66, Order 21 Rule 66(2), Order 21 Rule 89, Order 21 Rule 90

Citation : AIR 2011 AP 298 : (2011) 3 CivCC 437

Hon'ble Judges : L. Narasimha Reddy, J

Bench : Single Bench

Advocate : M. Radhakrishna, for the Appellant; S. Lakshminarayana Reddy, for the Respondent

Final Decision : Allowed

Judgement

L. Narasimha Reddy, J.—This civil revision petition presents an occasion to know the subtle distinction between the rights of the judgment debtor in a suit for foreclosure of mortgage, on the one hand, and ordinary money suit, on the other.

2. The 1st Respondent filed O.S. No. 83 of 2005 against the Petitioner, in the Court of Principal Senior Civil Judge, Nandyal, for redemption of mortgage. A preliminary decree was passed by the trial Court, on 08.06.2003. It appears that no appeal was filed against the preliminary decree. The Respondent filed I.A. No. 183 of 2006, for final decree and the same was allowed, on 05.01.2007. Since the Petitioner failed to pay the amount, the Respondent filed E.P. No. 76 of 2007, for sale of the mortgaged property, being a house with ground and first floors; in Nandyal Town.

3. Though it is not immediately relevant, it is necessary to mention that the daughter of the Petitioner filed O.S. No. 22 of 2007 in the Court of III Additional District Judge, Nandyal for specific performance of an agreement of sale, dated 06.04.2001, in respect of the same property. That, however, does not appear to have fructified.

4. The Petitioner filed I.A. No. 1156 of 2007, with a prayer to adjourn the sale proceedings stating that she intends to settle the matter within a period of 20 days. The I.A. was dismissed on 18.12.2007. The E.P. schedule property was brought to sale on 19.12.2007 and the 2nd Respondent had emerged as the highest bidder; for a sum of Rs. 13,00,000/-. The Petitioner filed I.A. No. 1163 of 2007, under Rule 90 of Order 21 Code of Civil Procedure, with a prayer to set aside the sale. Simultaneously, the executing Court posted the matter for confirmation of sale. E.A. No. 1163 of 2007 was dismissed by the Executing Court on 23.06.2010 and as a result, the same was confirmed. Challenging the said order, the Petitioner filed C.M.A. No. 7 of 2010 in the Court of III Additional District Judge, Kurnool. The appeal was dismissed on 30.07.2010. Hence, this revision.

5. Sri M. Radha Krishna, learned Counsel for the Petitioner, submits that material irregularity had crept into the sale, since the value of the property mentioned by the Petitioner herein was not reflected in the proclamation of the sale or the notification. He contends that stipulation of the value furnished by a judgment debtor, in the sale proclamation is mandatory under Rule 66 of Order 21 Code of Civil Procedure, as it applies to the State of Andhra Pradesh. He submits that the executing Court has chosen to permit a notification to be published in a totally unknown newspaper, hardly with any circulation and has conducted the sale in the Court premises. Learned Counsel further submits that his client has since deposited the entire decretal amount, in compliance with the interim direction issued by this Court on 30.08.2010, and the same needs to be treated as a step under Rule 5 of Order 34 CPC and in that view of the matter, the sale must be set aside.

6. Sri Laxminarayana Reddy, learned Counsel for the 1st Respondent, and Sri Subba Rao, learned Counsel for the 2nd Respondent, on the other hand, submit that each and every step in the execution was taken strictly in accordance with law, and every objection raised by the Petitioner was not only taken into account, but necessary corrections were also ordered. They contend that the value of the property, furnished by the Petitioner, as evidenced through a certificate issued by the Registering Authority, which is marked as Ex. B.1, was entered in the sale proclamation. They submit that the Petitioner did not file an application under Rule 89 of Order 21 Code of Civil Procedure, and subsequent deposit made by him, particularly in a revision, cannot be taken into account, for setting aside the sale. Learned Counsel further contend that a revision cannot be said to be continuation of the execution proceedings to enable the Petitioner to claim the benefit under the relevant rules of Order 34 Code of Civil Procedure.

7. Learned Counsel for the parties have relied upon precedents in support of their respective contentions.

8. Two points arose for consideration in this revision, namely,

a) Whether any irregularity has crept into the sale of the property in execution of

decree in question? and

b) Whether the Petitioner is entitled to the benefit under Rule 5 of Order 34 Code of Civil Procedure?

9. While the first question needs to be answered with reference to various provisions of Order 21, the second one is in the realm of Order 34 Code of Civil Procedure.

10. That the preliminary decree passed in favour of the 1st Respondent has become final; that it was followed by a final decree and that on account of failure on the part of the Petitioner in depositing the amount, an execution petition was filed, are matters of record. In a matter of this nature, the judgment debtor can pay the decretal amount at any stage, before the confirmation of sale. The principal controversy, however, is about legality of the steps that have been taken by the executing Court, be it while issuing the sale proclamation or when the sale of the property was affected.

11. Coming to the first aspect, Rule 66 of Order 21 CPC prescribes the procedure to be followed for causing the proclamation of the intended sale of the attached property. Sub-rule (2) thereof enlists the matters to be specified in the proclamation. It would be instructive, to have a glance at the provision:

66. Proclamation of sales by public auction.-

(1) Where any property is ordered to be sold by public auction in execution of a decree, the Court shall cause proclamation of the intended sale to be made in the language of such Court.

(2) Such proclamation shall be drawn up after notice to the decree-holder and the judgment-debtor and shall state the time and place of sale, and specify as fairly and accurately as possible-

(a) the property to be sold or, where a part of the property would be sufficient to satisfy the decree, such part;

(b) the revenue assessed upon the estate or part of the state, where the property to be sold is an interest in an estate or in part of an estate paying revenue to the Government;

(c) any incumbrance to which the property is liable;

(d) the amount for the recovery of which the sale is ordered; and

(e) every other thing which the Court considers material for a purchaser to know in order to judge of the nature and value of the property:

Provided that where notice of the date for settling the terms of the proclamation has been given to the judgment-debtor by means of an order under Rule 54, it shall not be necessary to give notice under this rule to the judgment-debtor unless the Court otherwise directs:

Provided further that nothing in this rule shall be construed as requiring the Court to enter in the proclamation of sale its own estimate of the value of the property, but the proclamation shall include the estimate, if any, given, by either or both of the parties.

(3) Every application for an order for sale under this rule shall be accompanied by a statement signed and verified in the manner hereinbefore prescribed for the signing and verification of pleadings and containing, so far as they are known to or can be ascertained by the person making the verification, the matters required by Sub-rule (2) to be specified in the proclamation.

(4) For the purpose of ascertaining the matters to be specified in the proclamation, the Court may summon any person whom it thinks necessary to summon and may examine him in respect to any such matters and require him to produce any document in his possession or power relating thereto.

It is important to note that the 2nd proviso to Sub-rule (2) mandates that the proclamation shall include the estimate, if any, given by either, or both the parties. Recognizing the importance of the value that the parties furnish for the property, the High Court of A.P., added a clause after (e) in Sub-rule (2), which runs as under.

value of the property as stated (i) by the decree-holder and (ii) by the judgment-debtor.

12. In the context of furnishing the estimates or value, it is the judgment-debtor, who is the most concerned and affected party. Left to himself, the decree holder may be inclined to furnish a deflated value, so that, he can get the property by participating in the auction, may be with the permission of the Court at a relatively lesser price; or may inspire third parties to offer their bids. Once the Rule makes it mandatory that the estimate or value furnished by the judgment-debtor must be reflected in the same proclamation, the executing Court has no option, but to mention it without any further scrutiny.

13. The record of the case on hand discloses that the Petitioner furnished the value of the property at Rs. 25,00,000/-. He filed the valuation certificate issued by a Municipal License Surveyor, according to which, the value of the property was shown at Rs. 13,00,000/-. However, the executing Court negated the contention of the Petitioner as to value, namely Rs. 25,00,000/-, through its order, dated 24.10.2007, and mentioned it as Rs. 13,00,000/-. This itself is a clear violation of Rule 66(2) of Order 21 Code of Civil Procedure. It is not as if the property must be sold only at the estimate made by the judgment debtor. The participants in the auction would have their own estimate on the property and at the most the values furnished by the parties, would provide guidance. Depending upon the factors such as the location of the property, the competition at the auction, the property may fetch a price, more than what is furnished by the judgment-debtor. Rule 66 does in no way confer the power upon the Court to adjudicate the accuracy of the values furnished by the parties, for the property

proposed to be sold.

14. In *M. Veeranjanyulu Vs. M. Saraswathamma*, this Court held that it is not at all desirable for an executing Court to arrive at a figure on its own. It was observed that the estimates furnished by the judgment-debtor and the decree-holder must be simply reflected and it must be left to the purchaser to take the same into account.

15. Rule 67 of Order 21 Code of Civil Procedure, requires that the proclamation shall be made and published as far as possible in accordance with the procedure prescribed under Rule 54(2) and that in addition thereto, the proclamation shall be published in the official gazette or local news paper or in both, as may directed by the Court.

16. In the instant case, the publication was made in a newspaper, known as "Andhra Charita", which does not have any publication worth its name. Nandyal is a very developed town and almost every prominent newspaper is in wide circulation in it. Each telugu news paper has its own district edition. No publication was made in those newspapers. Added to this, the Court had chosen to issue publication, which does not contain any estimate furnished by the Petitioner. The Court did not verify that even the estimate of Rs. 13,00,000/- ordered in its own proceedings as against Rs. 25,00,000/-, furnished by the Petitioner; was not furnished. The net result is that there was a serious flaw and fatal defect in the sale proclamation, at various stages. A sale effected in pursuance of such a proclamation, cannot be sustained in law.

17. The second point is about the right of the Petitioner to seek annulment of sale by depositing the decretal amount. As regards the exercise of such right, a clear distinction needs to be maintained between the decrees that emerge out of ordinary money suits, on the one hand, and mortgage suits, on the other. Whenever the property of a judgment-debtor in suit for money decree has brought to sale, he has a right under Rule 89 of Order 21 CPC to seek annulment of the sale, by making deposit of the decretal amount mentioned in the sale proclamation and a sum equal to 5% of the purchase money, payable to the auction purchaser. The Rule reads:

89. Application to set aside sale on deposit.-

(1) Where immovable property has been sold in execution of a decree, any person claiming an interest in the property sold at the time of the sale or at the time of making the application, or acting for or in the interest of such person, may apply to have the sale set aside on his depositing in Court,

(a) for payment to the purchaser, a sum equal to five per cent, of the purchase-money, and

(b) for payment to the decree-holder, the amount specified in the proclamation amount which may, since the date of such proclamation of sale, have been received by the decree-holder.

(2) Where a person applies under Rule 90 to set aside the sale of his immovable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule.

(3) Nothing in this rule shall relieve the judgment-debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale.

18. The limitation for such deposit is stipulated under Sub-rule (2) of Rule 92 Code of Civil Procedure, as 60 days from the date of sale. If an application under Rule 89 is made within the stipulated time, the judgment-debtor does not have to prove any irregularity in the sale, as such. Even if it is otherwise legal, the sale deserves to be set aside, if the amount as required under that Rule is deposited.

19. Decrees in suits for mortgage, however, stand on a different footing, in this context. A facility, which is almost identical to the one under Rule 89 of Order 21 is created, under Rule 5 of Order 34 CPC It reads:

5. Final decree in suit for sale.

(1) Where, on or before the day fixed or at any time before the confirmation of a sale made in pursuance of a final decree passed under Sub-rule (3) of this rule, the Defendant makes payment into Court of all amounts due from him under Sub-rule (1) of Rule 4, the Court shall, on application made by the Defendant in this behalf, pass a final decree or, if such decree has been passed, an order-

(a) ordering the Plaintiff to deliver up the documents referred to in the preliminary decree, and if necessary, -

(b) ordering him to transfer the mortgaged property as directed in the said decree, and also, if necessary, -

(c) ordering him to put the Defendant in possession of the property.

(2) Where the mortgaged property or part thereof has been sold in pursuance of a decree passed under Sub-rule (3) of this rule, the Court shall not pass an order under Sub-rule (1) of this rule, unless the Defendant, in addition to the amount mentioned in Sub-rule (1), deposits in Court for payment to the purchaser a sum equal to five per cent of the amount of the purchase-money paid into Court by the purchaser.

Where such deposit has been made, the purchaser shall be entitled to an order for repayment of the amount of the purchase-money paid into Court by him, together with a sum equal to five per cent thereof.

(3) Where payment in accordance with Sub-rule (1) has not been made, the Court shall, on application made by the Plaintiff in this behalf, pass a final decree directing that the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale be dealt with in the manner provided in Sub-rule

(1) of Rule 4.

20. It is evident that if a party deposits the amount due to the decree-holder, as well as a sum equal to 5% on the purchase money, an order of confirmation of sale shall not be passed.

21. In *Kharaiti Lal Vs. Raminder Kaur and Others*, the Hon'ble Supreme Court interpreted the expression "before confirmation of the sale" occurring in Rule 5 of Order 34 Code of Civil Procedure, as meaning, any stage of the proceedings, including the one, before the appellate or further Courts. The relevant portion reads as under:

What is the meaning of the phrase "before the confirmation of sale" may now be considered in the light of other relevant provisions of the Code of Civil Procedure.

The above question is identical to the question framed by the Division Bench of the High Court in this case. This Court, on a consideration of a number of decisions, including the decision of this Court in *Hukamchand Vs. Bansilal and Others*, laid down that if an appeal was pending against an order refusing to set aside the sale, the confirmation of sale and also the issuance of Sale Certificate would be in a nebulous state and, consequently, it would be open to the judgment-debtor to invoke the provisions of Order 34 Rule 5, CPC and make the necessary deposits to save his property from being transferred to a third person or, may be, to the decree-holder, in execution of the decree passed in the mortgage suit. It may be mentioned that in *U. Nilan Vs. Kannayyan (Dead) Through Lrs.*, reliance was also placed upon the decision of this Court in *Maganlal Vs. Jaiswal Industries, Neemach and Others*, in which it was held that the sale does not become absolute or irrevocable merely on passing an order confirming the sale under Order 21, Rule 92 but it would attain finality on the disposal of the appeal, if any, filed against an order refusing to set aside the sale.

22. The result is that the judgment debtor in a suit for mortgage would have a facility to seek annulment of the sale, which is more liberal in nature, when compared to the one available to a decree-holder in other suits, under Rule 89 of Order 21 Code of Civil Procedure.

23. It is brought to the notice of this Court that the Petitioner deposited the entire E.P. amount in compliance with a condition imposed by this Court, while passing an interim order. It is no doubt true that the amount was deposited after dismissal of the appeal. Since an appeal can be filed against the order passed in the E.A., a revision filed against the order passed in the appeal, can certainly be treated as continuation of the proceedings.

24. For the foregoing reasons, the C.R.P. is allowed and the order under revision is set aside. It is directed that,

a) the Petitioner shall be under obligation to deposit the entire decretal amount and a sum representing 5% of the sale amount i.e. Rs. 65,000/-. If any portion of this amount has not been deposited as yet, he shall deposit the same within

four weeks from the date on which, the Executing Court reopens after Sankranthi Vacation, 2011;

b) the 1st Respondent shall be entitled to withdraw the decretal amount, and the 2nd Respondent shall be entitled to withdraw the sale consideration deposited by him as well as a sum of Rs. 65,000/- that may be deposited by the Petitioner; and

c) on completion of these formalities, the mortgage covered by the decree shall stand redeemed.

25. There shall be no order as costs.